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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Avax International IP Holdings, Inc.[1]

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Serial No. 75/272,715

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Amy J. Benjamin of Darby & Darby, P.C. for Avax International IP Holdings, Inc.

Barney L. Charlon, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Seeherman, Bucher and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 10, 1997, Avax International IP Holdings, Inc. (applicant), through its predecessor, filed a trademark application to register the mark AC VACCINE TECHNOLOGY (in typed form) on the Principal Register for

[1] Avax Technologies, Inc. assigned the application to Avax International IP Holdings, Inc. in a document recorded at Reel/Frame 2119/0270.

goods ultimately identified as "vaccine for the treatment of cancer" in International Class 5.[2]

The Examining Attorney ultimately refused to register the mark on the ground that the mark, when applied to the goods, is deceptively misdescriptive under Section 2(e)(1) of the Trademark Act. 15 U.S.C. § 1052(e)(1). After the Examining Attorney made the refusal final, applicant filed a notice of appeal. Both applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

We affirm the Examining Attorney's refusal to register.

The Examining Attorney's position is that the mark AC VACCINE TECHNOLOGY is deceptively misdescriptive when used in connection with a vaccine for the treatment of cancer. The Examining Attorney relies on medical and other dictionary definitions of the terms "AC" "vaccine" and "technology." The medical dictionary defined "AC" as "a cancer chemotherapy regimen consisting of Adriamycin (doxorubicin) and cyclophosphamide." *Dorland's Illustrated Medical Dictionary* (1992). From the Internet, the Examining Attorney included information that showed that

[2] The application is based on an allegation of a bona fide intention to use the mark in commerce.

the term "AC" is used to describe a treatment for cancer patients.

> A Randomized Trial Comparing Preoperative Doxorubicin (Adriamycin) Cyclophosphamide (AC) to Preoperative AC Followed by Preoperative Docataxel (Taxotere) and to Preoperative AC Followed by Postoperative Docetaxel in Patients with Operable Carcinoma of the Breast. *Kansas City Clinical Oncology Program*.
>
> "AC"
> Adriamycin® (Doxorubicin)
> Cyclophosphamide (Cytoxan®)
> How do these drugs work?
> These are "chemotherapy" drugs that prevent the division of DNA and growth of cancer cells….
> *Medical Oncology.*

The Examining Attorney also submitted applicant's press release to show that applicant uses the term "vaccine technology" descriptively.

> Avax … is a company with a commercially available cancer vaccine in Australia, several products in clinical and preclinical development, and additional commercialization opportunities in Europe for both its cancer vaccine technology and its technology for joint repair.
> Avax Press Release dated October 3, 2000.

In addition, the Examining Attorney included evidence that showed that the term "vaccine" is used descriptively in relationship to cancer treatment, i.e., a cancer vaccine. The Examining Attorney concludes:

> Accordingly, the mark AC VACCINE TECHNOLOGY is deceptively misdescriptive of applicant's "vaccine for the treatment of cancer" because it conveys the false, though plausible, idea that applicant's vaccine is intended to be used in conjunction with the chemotherapeutic agent AC, which is recognized in the

> field of medicine as a standard abbreviation of the chemotherapeutic agent Adriamycin cyclophosphamide. In the alternative, however, if applicant's goods are in fact intended to be used in conjunction with Adriamycin cyclophosphamide, or AC, the mark AC VACCINE TECHNOLOGY must then be deemed to be merely descriptive of applicant's goods.
> Examining Attorney's Br. at 9.

In response to the refusal to register, applicant argues that AC has many meanings including at least eleven in the medical community. Applicant's Br. at 7. It submitted three declarations from people with Doctorates of Pharmacy. The first declarant stated:

> Although I am familiar with adriamycin, cyclophosphamide as a chemical used during chemotherapy to treat cancer patients, it is my opinion that AC is not a specifically defined, unique abbreviation in the industry for adriamycin, cyclophosphamide.
> McEvoy declaration, p. 2.

The second declarant "was surprised to learn that AC is an abbreviation [for] "adriamycin, cyclophosphamide" and also stated that "AC is not a commonly known abbreviation in the industry for "adriamycin, cyclophosphamide." Dahl declaration, p. 2.

The third declarant disagreed with Dahl and stated that the "abbreviation AC, when used in the oncology field calls to my mind the chemotherapy drug adriamycin, cyclophosphamide, which is used to treat breast cancer." Valley declaration, p. 2. Valley further admitted that

"AC is commonly known as an abbreviation for adriamycin, cyclophosphamide" but she stated that it has no relation to vaccines. Id.

Applicant argues that "[p]ersons with a medical background who would encounter Avax's AC VACCINE TECHNOLOGY mark would not believe that a 'vaccine,' i.e., preparation made from organisms for increasing immunity to a particular disease, would contain a chemical compound consisting of an antibiotic and an alkylating agent with antitumor activity." Applicant's Br. at 12.

The primary issue in this case is whether the term AC VACCINE TECHNOLOGY is deceptively misdescriptive of applicant's goods. In cases involving the issue of misdescriptiveness, we apply the following test:

> The test for deceptive misdescriptiveness has two parts. First we must determine if the matter sought to be registered misdescribes the goods. If so, then we must ask if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. Gold Seal Co. v. Weeks, 129 F.Supp. 928 (D.D.C. 1955), aff'd sub nom. S.C. Johnson & Son v. Gold Seal Co., 230 F.2d 832 (D.C. Cir.) (per curiam), cert. denied, 352 U.S. 829 (1956). A third question, used to distinguish between marks that are deceptive under Section 2(a) and marks that are deceptively misdescriptive under Section 2(e)(1), is whether the misrepresentation would materially affect the decision to purchase the goods. Cf. In re House of Windsor, Inc., 221 USPQ 53 (TTAB Dec. 14, 1983).

In re Quady Winery, Inc., 221 USPQ 1213, 1214 (TTAB 1984).

We are constrained to consider the issue of misdescriptiveness based on the goods as described in the application. Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed"); In re Vehicle Identification Network, Inc., 32 USPQ2d 1542 (TTAB 1994) (Descriptiveness of mark in an intent-to-use application determined by services identified in application).

Viewed under these legal standards, the evidence supports the Examining Attorney's position that applicant's mark misdescribes a vaccine for the treatment of cancer that is not used in conjunction with Adriamycin, cyclophosphamide. First, we find that the term "AC" is a recognized abbreviation for a cancer chemotherapy regimen consisting of Adriamycin and cyclophosphamide. The *Dorland's* medical dictionary and the Internet articles describing the use of AC in the treatment of cancer adequately support the Examining Attorney's position.

Applicant's Valley declaration lends additional support to this finding. As previously noted, Valley agrees that "AC, when used in the oncology field, calls to my mind the chemotherapy drug adriamycin, cyclophosphamide, which is used to treat breast cancer." Valley declaration, p. 2. The declaration goes on to acknowledge that "AC is commonly known in the industry as an abbreviation for adriamycin cyclophosphamide." Id. Applicant further acknowledges that its "vaccine does not contain or 'consist of' Adriamycin or cyclophosphamide" although it admits that patients "may be pre-treated with cyclophosphamide." Response dated May 11, 1998 at 2 and n.1. Therefore, the term AC would be misdescriptive of a chemotherapy treatment for cancer that did not utilize Adriamycin and cyclophosphamide.

Second, we find that the addition of "vaccine technology" does not overcome the deceptively misdescriptive nature of the mark. Applicant's identification of goods uses the term "vaccine" as the name of the goods. Its own press release dated October 3, 2000 (p.1) reports that applicant "has a commercially available cancer vaccine in Australia." The term "technology," defined as "a technical method of achieving a practical purpose" (First Office Action, p. 2), has descriptive

significance in the medical and oncology areas. We are aware that "'technology' is a very broad term which includes many categories of goods." In re Hutchinson Technology Inc., 852 F.2d 552, 7 USPQ2d 1490, 1493 (Fed. Cir. 1988). Unlike in the Hutchinson Technology case, the record here supports the finding that the term "technology" is descriptive when applied to vaccines. Again, we look at applicant's press release that refers to "additional commercialization opportunities in Europe for both its cancer vaccine technology and its technology for joint repair." Press release dated October 3, 2000, p. 1. Its president refers to its "TK suicide gene technology." Id. In addition, the Examining Attorney points out that the term "technology" has been disclaimed in several registrations that were made of record (Registration Nos. 2,381,827; 1,975,197; and 1,819,655). Finally, we note that applicant's declarant McEvoy uses the word in a descriptive sense in his declaration. McEvoy declaration, p. 2 ("[T]he drugs adriamycin and cyclophosphamide have no relation to vaccine technology").

Next, we find that the record demonstrates that cancer vaccines and chemotherapy are used together in fighting cancer. "Cancer Vaccine Trial Expanded with Sarcoma Study … O-Vax is intended to prevent the recurrence of ovarian

cancer in women after surgery or chemotherapy." *Medical Industry Today*, October 18, 2000. "Breast Cancer Vaccine Gets on Fast Track – The designation applies to the investigation of Theratope vaccine as an adjunct to first-line chemotherapy for its effect on delaying progression of metastic breast cancer and overall survival." *Medical Industry Today*, May 9, 2000. "Aphton's vaccines would be an addition to surgery and chemotherapy, not a replacement." *Miami Herald*, April 24, 2000. "Combinations of chemotherapy and new experimental cancer vaccines or new drugs such as alpha-interferon are giving more options to the most advanced melanoma patients." *Hartford Courant*, April 9, 2000. "The strategy is to team a vaccine with existing treatments such as chemotherapy and radiation to produce longer remissions, or perhaps even cures." *Omaha World-Herald*, April 17, 2000. "Girl In Battle with Cancer…When she arrives in Memphis, her treatment will involve heavy chemotherapy to prepare her body for the vaccine." *Virginian-Pilot*, December 19, 1999. The evidence supports the argument that cancer vaccines and chemotherapy are complimentary treatments that are used together in the battle against cancer.

Finally, we find that cyclophosphamide, one of the two drugs that make up AC, is used with cancer vaccines.

"Following the cyclophosphamide, vaccine injections mixed with the adjuvant Baccillus Calmette-Guerin (BCG) commence on a weekly basis." O-Vax™ Clinical Trial. "Patients [with melanoma] will also receive one dose of cyclophosphamide 3 days before the first vaccine." M-Vax™ Clinical Trial. Applicant also admits that patients may be pre-treated with cyclophosphamide before the administration of applicant's preparation. Response dated May 11, 1998, p. 2, n.1.

The next question is whether the mark AC VACCINE TECHNOLOGY in its entirety is deceptively misdescriptive for vaccines for the treatment of cancer. We have already found that AC is a common abbreviation for a cancer chemotherapy regimen involving Adriamycin and cyclophosphamide. Cancer vaccines, also referred to as vaccine technology, exist and they are used in conjunction with traditional cancer treatments such as chemotherapy. Finally, we have found that cyclophosphamide specifically is used together with cancer vaccines. Potential purchasers, therefore, are likely to believe that applicant's vaccine for the treatment of cancer is designed to be used in conjunction with the known cancer chemotherapy regimen involving AC. Because applicant's goods will not contain or are not intended to be used with

Adriamycin, we find that the mark deceptively misdescribes the goods.

We note that applicant's pharmacist declarants conclude that AC is not related to vaccines or vaccine technology. However, the declarations are undercut by the fact that the declarants cannot agree on whether AC is a recognized abbreviation in the industry. Also, McEvoy (pp. 2-3) states that persons encountering the term AC VACCINE TECHNOLOGY would not view the term as referring to adriamycin, cyclophosphamide because of the "[i]napplicability of the chemotherapy drugs adriamycin and cyclophosphamide to vaccines. However, the record clearly shows a direct connection between cyclophosphamide and vaccines that the declarant does not acknowledge or explain. Similarly, the Valley declaration (p. 2) states that "the chemotherapy drug adriamycin, cyclophosphamide has no relation to vaccines." Inasmuch as chemotherapy and cancer vaccines are often used together and cyclophosphamide is specifically used with cancer vaccines, we do not find these declarations convincing that there is a lack of a connection between AC and vaccines.

In conclusion, we find that the term AC VACCINE TECHNOLOGY misdescribes the goods. The term AC would be recognized as a drug used to treat cancer in a chemotherapy

regimen. Chemotherapy and vaccines are used together to fight cancer and cyclophosphamide is used with cancer vaccines. "Vaccine" and "technology" are terms used at least descriptively in reference to vaccines. Since applicant's product is apparently not used in conjunction with adriamycin, the mark AC VACCINE TECHNOLOGY misdescribes the vaccine. We also find that people are likely to believe the misrepresentation. As a recognized drug used to treat cancer patients, AC would be expected to be used in conjunction with the treatment of cancer with a vaccine.[3]

Decision: The Examining Attorney's refusal to register the mark AC VACCINE TECHNOLOGY on the ground that it is deceptively misdescriptive of applicant's vaccine for the treatment of cancer is affirmed.

[3] The Examining Attorney also alternatively refused to register the mark on the ground that applicant's mark is merely descriptive. Because applicant maintains that the goods do not contain Adriamycin and cyclophosphamide and that patients may be pre-treated with cyclophosphamide only, the question is whether the mark is deceptively misdescriptive. Therefore, we will not further address the merely descriptive refusal other than to note that if applicant's goods were to be used in conjunction with Adriamycin and cyclophosphamide, applicant's mark would be merely descriptive for a vaccine for the treatment of cancer used in conjunction with a cancer therapy regimen utilizing Adriamycin and cyclophosphamide.